FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA,
Petitioner,

-vs-

ANTHONY ROBERT WHEELER,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

WHETHER SUCCESSIVE PROSECUTIONS FOR THE SAME OFFENSE IN THE INDIAN TRIBAL COURT AND THE FEDERAL DISTRICT COURT ARE ALLOWED UNDER THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

STATEMENT OF THE CASE

FACTS

During the evening of October 16, 1974, a Navajo tribal police officer and a Bureau of Indian Affairs (B.I.A.) investigator arrested the respondent as he sat in his pickup truck located within the fenced compound of the B.I.A. high school, northwest of the LDS Church, Many Farms, Arizona, within the confines of the Navajo reservation. (A. 14, 19, 22).

While at the crime scene, the respondent was advised of his rights and volunteered statements regarding the incident and the female victim. (A. 15, 17-18, 19-23). He was then placed in the Navajo tribal jail, Chinle, Arizona, and charged by the tribal police officer with disorderly conduct (DC) in violation of Title 17-351 of the Navajo Tribal Code. (A. 8).

The next day the B.I.A. officer investigated the rape complaint and obtained a statement from the respondent at the Navajo tribal jail. (A. 20-21, 23).

On October 18, 1974, the tribal officer filed a complaint with the Navajo tribal court, Chinle, Arizona, charging the respondent with contributing to the delinquency of a minor (CDM), in violation of Title 17-321 of the Navajo Tribal Code. (A. 7). Both the CDM and DC complaints stemmed from the above described incident. (A. 7-8, 27). Following his guilty plea to both charges on October 18, 1974, the respondent was convicted and sentenced by the tribal court. (A. 9-10).

DISTRICT COURT PROCEEDINGS

On May 21, 1975, the respondent was indicted in the United States District Court for the District of Arizona for assault concerning the incident of October 16, 1974, in violation of 18 U.S.C. 1153 (A. 11). After the assault indictment was

challenged by the respondent on grounds not relevant to this case, the Grand Jury returned a superseding indictment on November 19, 1975, charging the respondent with statutory rape, in violation of 18 U.S.C. 1153 (A. 12).

On the morning of trial, February 5, 1976, the respondent produced certified copies of his Navajo tribal court convictions and moved to dismiss the indictment on double jeopardy grounds. (A. 25-26, 28, 31). The prosecution conceded that the statutory rape indictment involved the same facts as the tribal court convictions (A. 27) and admitted that this was the first time that it had heard that the respondent had been prosecuted in tribal court (A. 26). After rejecting the dual sovereignty exception recognized in *United States v. Lanza*, 260 U.S. 377 (1922), the district court granted the respondent's motion and dismissed the indictment on double jeopardy grounds. (A. 29-32).

COURT OF APPEALS

The Court of Appeals for the Ninth Circuit affirmed the District Court judgment on December 2, 1976. *United States v. Wheeler*, 545 F.2d 1255 (9th Cir., 1976) (Pet. App. A). The Court stated that the "dual sovereignty" rationale of *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852) has been narrowly construed and this Court "has never applied it outside of the federal court and state court context", citing *Grafton v. United States*, 206 U.S. 333 (1907) and *Waller v. Florida*, 397 U.S. 387 (1970). *Id.* 1257. The Court reasoned that although Indian tribes maintain a "semi-independent position" within the borders of the United States, they are arms of the federal sovereign and, unlike states, are subject to the "complete plenary control" of the federal government. *Id.* 1257. (Pet. App. A, p. 5a). Based on this reasoning, the Court held that Indian tribal courts and federal district courts are (1) "not arms of separate sovereigns and, therefore, an individual cannot be tried for the same offense" in

both courts, and (2) that the double jeopardy guarantee was violated by prosecution of the respondent in federal district court for the greater charge of statutory rape after he had been tried in Indian tribal court for the lesser included offense of contributing to the delinquency of a minor. *Id.* 1256, 1258. (Pet. App. A, 1a-2a, 7a-8a).[1]

SUMMARY OF ARGUMENT

Successive prosecutions in the Indian tribal court and the federal district court are barred by the Double Jeopardy Clause of the Fifth Amendment because these courts are arms of the federal sovereign.

A. The dual sovereignty exception to the Double Jeopardy Clause allows successive prosecutions *only* by state and federal sovereigns. In the federal district court, such prosecutions are brought only in exceptional circumstances and only after a finding of compelling reasons by the Attorney General.

1. The dual sovereignty exception was first established as a rule of law in the mid-nineteenth century. See *Moore v. Illinois*, 55 U.S. 13 (1852), and authorities cited therein. This exception became firmly established in our federal system of government when *United States v. Lanza*, 260 U.S. 377 (1922) was confirmed by *Bartkus v. Illinois*, 359 U.S. 121 (1950) and *Abbate v. United States*, 359 U.S. 187 (1950).

2. The Court has never extended the dual sovereignty exception beyond the state-federal arena. In *Grafton v. United States*, 206 U.S. 333 (1907), the Court refused to extend it to

[1] The Court also held that contributing to the delinquency of a minor is a lesser included offense to statutory rape. 545 F.2d at 1258 (Pet. App. A. 7a-8a). The petitioner does not present this as a question for this Court to answer. (Pet. 6, n. 3).

the United States territories, which are self-governing arms of the federal sovereign. *Grafton* was then cited as controlling when the Court refused to extend the doctrine to the state-like territory of Puerto Rico in *Puerto Rico v. The Shell Co.*, 302 U.S. 253 (1937).

The Court has consistently voiced a lack of sympathy for the exception as evidenced by the language of the prevailing opinion in *United States v. Lanza*, p. 377, supra, and in the recent opinion of this Court in *Rinaldi v. United States*, ____ U.S. ____, No. 76-6194 (11-7-77), 22 Cr.L. 4061. In recognition of the Court's distaste for successive trials, the Department of Justice has long exercised the Petite policy. This policy prohibits successive trials in the state and federal arena and within the federal system itself absent a finding by the Attorney General of compelling reasons therefore. 22 Cr.L. 4062, n. 5.

3. This Court has long recognized that Indian tribes are not sovereign like states. They are wards of the federal government without sovereign title to their lands and are subject to the plenary powers of Congress. This was recognized in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and recently in *United States v. Antelope*, 430 U.S. 641 (1977).

4. Viewed in perspective, it is clear that the judicial history of Indian tribes in America reflects their constantly changing status as federal wards subject to the plenary power of Congress. *United States v. Kagama*, 118 U.S. 375 (1886), recognized that there are only two sovereigns under the Constitution, states and the federal government, and that Indian tribes come under the Constitution and are within the federal territory. Pursuant to its *plenary legislative power*, Congress can control every phase of tribal life, including tribal existence and self-government, without judicial restraint. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Only absent contrary federal law can the Indian tribes regulate their internal affairs. In cases following *Kagama*, such as *Cherokee Nation v. The Southern Kansas Railway Co.*, 135 U.S. 641 (1890) and *Talton v. Mayes*, 163 U.S. 376 (1896), the

Court did not sway from the basic principles of *Kagama*, although in expansive dicta in *Talton*, it used the notion of inherent sovereignty to characterize the source of tribal power to govern internal matters not already controlled by applicable treaties and federal law. *Id.* 379-384.

5. During this century, Courts have consistently recognized that the federal government has generally expanded its influence and control over Indian tribes. As a result, although tribes have vestiges of sovereignty based upon their pre-Constitutional existence, in reality, they and their courts are closely supervised arms of the federal sovereign subject to the complete plenary control of the federal government. Many courts, including the Court in *Colliflower v. Garland*, 342 F.2d 269 (9th Cir., 1965), have held that tribal courts are arms of the federal sovereign.

The evolution and expansion of federal legislative control over tribal courts is evidenced by (1) the Major Crimes Act expansion (18 U.S.C. 1153); (2) the vesting of exclusive criminal jurisdiction over tribes in state governments under Public Law 280 (67 Stat. 588; 18 U.S.C. 1162); (3) the application of the Bill of Rights and the reduction of the penalty power of tribal courts by the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.); and (4) the plethora of controlling federal law contained in Title 25 United States Code and Volume 25 Code of Federal Regulations. Under the circumstances, the Court of Appeals for the Ninth Circuit was correct in concluding that tribal courts are not states, but arms of the federal sovereign. *United States v. Wheeler*, 545 F.2d at 1258 (Pet. App. A. p. 6a).

6. Since World War II, the Court has continued to recognize that tribes are not sovereign like states. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Court attempted to place the confusing notion of inherent tribal sovereignty in its historical perspective when it characterized it as a "platonic notion", a "moot question . . . of little more than theoretical importance" and not a means for reaching a "definitive resolution of the issues". *Id.* 172. Instead, in

McClanahan, at 172-181, and cases thereafter, the Court has relied upon applicable treaties, statutes, and laws to resolve disputes concerning the tribes. In *Keeble v. United States*, 412 U.S. 205 (1973), the Court held that an Indian prosecuted pursuant to 18 U.S.C. 1153 is entitled, like any other defendant tried in federal district court under federal law and procedure, to a lesser included offense instruction although the offense is within the exclusive jurisdiction of tribal court and is not contained in the United States Code; in *United States v. Mazurie*, 419 U.S. 544 (1975), the Court held that Congress has power under the commerce clause, Art. I §8(3), to delegate to Indian tribes the authority to enact a tribal ordinance to control liquor sold in the Indian country; and in *United States v. Antelope*, 430 U.S. 641 (1977), the Court held that Indian defendants are subject to prosecution under 18 U.S.C. 1153 only because they are wards of the federal guardian. They are not racially disadvantaged and denied equal protection of the law because, like all other federally prosecuted defendants, they are treated equally in the federal forum. *Id.* 647-650.

7. The petitioner makes a political policy argument when it asks this Court, because of the "undesirable consequences" that it foresees as resulting from an affirmance of *Wheeler*, to extend the strongly criticized and narrowly applied dual sovereignty exception to the tribal-federal setting. Although thousands of cases are prosecuted each year in tribal courts, only one case, *United States v. Walking Crow*, ____ F.2d ____ (No. 77-1136, 8th Cir., 8-10-77), petition for cert. pending, #77-5539, has held that Indian tribes are not arms of the federal sovereign for double jeopardy purposes. (Appendix, Supplemental Memorandum for the United States). Undesirable consequences, such as the possibility that tribal independence might be further restricted by new legislation enacted to prevent Indians from *avoiding* a Major Crimes Act prosecution by subjecting themselves to tribal court prosecution is not a significant problem. Even if it were, the legislative branch, not the judicial, must provide a solution as it has done in the past.

B. The facts of the case outlined above clearly show that the various exceptions to the Double Jeopardy Clause stated in *Jeffers v. United States*, ___ U.S. ___, #75-1085 (1977), plurality opinion, slip op. 13-15; and in *Brown v. Ohio*, ___ U.S. ___, #75-6933, slip op. 8, n. 7, as well as the exception stated by Mr. Justice Brennan in his concurring opinion in *Ashe v. Swenson*, 397 U.S. 436 at 453, n. 7, do not apply. The first exception would apply only "when the facts necessary to the greater [charge] were not discovered despite the exercise of due diligence before the first trial". *Jeffers v. United States*, slip op. 14; *Brown v. Ohio*, slip op. 8, n. 7. In the respondent's case, however, all facts necessary to the statutory rape charge were known before the tribal court prosecution. (A. 15-21).

The next exception is noted by Mr. Justice Brennan in his concurring opinion in *Ashe v. Swenson*, 453, n. 7, supra. He suggests that when two separate jurisdictions within a single sovereign do not have concurrent jurisdiction over the same offense they can both punish a defendant because he will not be twice in jeopardy for the same offense. *Grafton v. United States*, *supra*, *Puerto Rico v. The Shell Co.*, *supra*, and *Brown v. Ohio*, *supra*, have eliminated the viability of this argument.

Another exception that does not apply to the respondent's case is the waiver exception announced in *Jeffers v. United States*, ___ U.S. ___, #75-1805 (1977), at slip op. 15-16. This exception allows a second trial where a defendant expressly requests separate trials although a single trial on the greater and lesser included charges would have been proper. The respondent neither asked for separate trials on the greater and lesser offenses nor in opposition to trial together, failed to raise the issue that one offense might be a lesser included offense of the other.

Finally, the new tribal-federal dual authority exception proposed by the petitioner for the unique tribal-federal setting must also fail. It is merely a new title to the old federal-territorial and state-municipal exceptions rejected by the Court in *Grafton* and *Waller*.

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

SUCCESSIVE PROSECUTIONS IN THE INDIAN TRIBAL COURT AND THE UNITED STATES DISTRICT COURT ARE BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH ADMENDMENT BECAUSE THESE COURTS ARE ARMS OF THE SAME SOVEREIGN.

A. The history of the dual sovereignty exception to the Double Jeopardy Clause shows that it has been applied only in the state-federal context and has been given only narrow application.

1. Constitutional development of the dual sovereignty exception:

The Constitutional guarantee against double jeopardy stems from the Fifth Amendment provision that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". The "dual sovereignty" exception to this guarantee emerged in the 19th Century in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852). This doctrine allows successive state and federal prosecutions of a defendant for the same crime. In *Moore v. Illinois*, *supra*, the Court announced the definitive statement[2] of the rule:

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[2] This characterization of the rule was made by the Court in *Bartkus v. Illinois*, 359 U.S. 121, 131 (1950).

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both . . . that either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this Court has decided, in the case of *Fox v. The State of Ohio,* . . . . that a State may punish the offense of uttering or passing false coin, as a cheat or fraud practised on its citizens; and, in the case of the *United States v. Marigold,* . . . that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States." 55 U.S. (14 How.) 19-20.[3]

In *Abbate v. United States,* 359 U.S. 187, 190-194 (1959), as well as the companion case of *Bartkus v. Illinois,* 124-136, supra, the constitutional development of the two sovereigns doctrine was traced. In *Abbate,* the Court noted that in 1922, in *United States v. Lanza,* 260 U.S. 377, it was recognized that states obtain their general sovereign powers to make acts criminal from the powers originally belonging to and reserved for them by the Tenth Amendment to the Constitution.[4] *Id.* 193, and that "States under our federal system have the principal

[3] *Moore* held that successive state and federal prosecutions of the defendant for harboring a slave were valid under the two sovereigns exception. 55 U.S. (14 How.) at 20.

[4] The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

responsibility for defining and prosecuting crimes. See *Screws v. United States,* 325 U.S. 91, 109; *Jerome v. United States,* 18 U.S. 101, 104-105." *Id.* 195.[5]

2. The dual sovereignty doctrine has been applied only in the state-federal setting and has been given narrow application.

The petitioner cites no case of this Court that has ever applied the dual sovereignty exception outside of the state-federal setting.[6] In fact, attempts to extend the doctrine outside of this arena have been consistently rejected by the Court. In *Grafton v. United States,* 206 U.S. 333 (1907), the Court prohibited a second prosecution of a United States Army soldier in the Philippine territorial court after he had been tried for the same acts in the military court. In *Waller v. Florida,* 397 U.S. 387 (1970), the Court prohibited successive prosecutions in the municipal and state courts of Florida. In both *Grafton* and *Waller* the Court reasoned that military and territorial courts and state and municipal courts were both arms of the same sovereigns respectively. Being arms of the same sovereign, a second prosecution for the same crime was prohibited under the Double

[5] In *Screws,* p. 109, supra, the Court said that "[o]ur national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States". The dissent in *Bartkus,* p. 157, supra, also recognized that "in purely local matters the power of the States is supreme and exclusive".

[6] *United States v. Walking Crow,* ___ F.2d ___ (77-1136, 8th Cir., 8/10/77), cited by the petitioner at pp. 29 and 37 of his brief is the only case to hold that the dual sovereignty exception applies outside of the federal-state arena.

Jeopardy Clause of the Fifth Amendment. *Grafton v. United States,* pp. 352, 354-355, supra; *Waller v. Florida,* pp. 394-395, supra.[7]

Further, from the Court's refusal to apply it to the territory of Puerto Rico, it is evident that the dual sovereignty exception to the Double Jeopardy Clause is applicable only in the state-federal setting. In *Puerto Rico v. The Shell Co.,* 302 U.S. 253, 264 (1937), the Court ruled that the Sherman Anti-Trust Act did not bar the territory of Puerto Rico from adopting and enforcing its own anti-trust laws. The Court, relying on *Grafton v. United States,* supra, reasoned that such conduct would not offend the Double Jeopardy Clause because both the Puerto Rican and federal courts, whether exercising federal or local jurisdiction, are "creations emanating from the same sovereignty." *Id.* 264-265.

It is significant to note that although in 1937 the Court recognized that Puerto Rico had a degree of "autonomy similar to that of the states", *Puerto Rico v. The Shell Co.,* p. 262, supra, the territory was and still is considered to be a creature of the United States within the meaning of the dual sovereignty exception to the Double Jeopardy Clause. Unlike the lesser

[7] In *Grafton* the Court used language strikingly similar to that repeatedly used by this Court to characterize the tribal-federal relationship discussed in parts (3)-(7), infra, when it said that "the jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount." *Id.* 354. See also *Cherokee v. Southern Kansas Railway Co.,* 135 U.S. 641, 653-657 (1890), and *Lone Wolf v. Hitchcock,* 87 U.S. 553 (1903). Striking a theme similar to *Grafton* and *Waller,* in its 1958 publication *Federal Indian Law* (1958) at p. 450, the Department of the Interior concluded that "[i]n effect, then, an Indian tribe bears a relation to the Government of the United States similar to that which a Territory bears to such Government and similar again to that relationship which a municipality bears to a State". Periodic revisions and updating of this treatise, originally authored by Felix Cohen in 1940, have confused the notion of tribal sovereignty. See Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?,* 51 Notre Dame Law. 600, 613-614 n. 107.

degree of self-governing powers vested in Indian tribes by the federal government,[8] the Court recognized that Congress, through various legislative enactments, gave to Puerto Rico full powers of local self-government, "[t]he effect [of which] was to confer upon the territory many of the attributes of quasi-sovereignty possessed by the states . . ." *Id.* 262. The Court noted that Puerto Rico was given "immunity from suit without their consent",[9] had a separate executive, legislative and judicial system and was a "body politic". *Id.* 262. The Court further observed that, absent express Congressional legislation to the contrary, there was nothing that suggested a congressional intent to limit Puerto Rico's power to legislate on local or internal matters. In fact, evidence of the opposite intent—to allow Puerto Rico local powers of self-government in areas not covered by federal law—was outlined in that opinion. *Id.* 260-263. Nevertheless, because it is a territory and creature of the United States, subject to its plenary powers, the Court ruled that citizens of Puerto Rico cannot be subjected to the dual sovereignty exception to the Double Jeopardy Clause. *Id.* 264-265.[10]

Throughout the decisions recognizing and construing the scope of the dual sovereignty exception, this Court has repeatedly emphasized that the exception should be narrowly applied. In

[8] See discussion, parts (4) and (5), infra.

[9] Because Indian tribes are not sovereign entities, they are immune from suit *only* because of Congressional policy. See *United States v. United States Fidelity Co.,* 309 U.S. 506, 512 (1940), discussed at p. 18, infra.

[10] Although in 1952, in conferring Commonwealth status on Puerto Rico, "Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States", *Examining Board v. Flores de Otero,* 426 U.S. 572, 597 (1976), Congress still possesses plenary control, although recognized as ineffective, over territorial governments. *Id.* 596. *Puerto Rico v. The Shell Co.,* supra, and *Grafton v. United States,* supra, still prevent the application of the Dual Sovereignty exception to these arms of federal sovereign.

Rinaldi v. United States, ___ U.S. ___ (No. 76-6194, 11-7-77); 22 Cr.L. 4061, at 4063, this Court affirmed its "continuing sensitivity to the fairness implications of the multiple prosecution power". Based upon such concern and upon the urging of the Petite policy by the Solicitor General,[11] it summarily remanded the petitioner's case to the District Court for dismissal of his federal indictment and conviction because of his earlier State court conviction for the same offense.

In reaching this decision, the Court recognized that "the Petite policy was formulated by the Justice Department in direct response to this Court's opinions" in *Bartkus* and *Abbate.* It also relied on the statement of Mr. Chief Justice Taft in *United States v. Lanza,* 260 U.S. 377, 383, that successive prosecutions by the state and federal systems for the same offense would not occur except "in instances of peculiar enormity, or where the public safety demanded extraordinary vigor," and on the statement of the Court in *Bartkus v. Illinois,* p. 138, supra, that "[t]he greatest self-restraint is necessary when the federal system yields results with which a court is in little sympathy." 22 Cr.L. at 4063.

In addition to the barrier presented by *Grafton, Waller* and *Puerto Rico v. The Shell Co.,* this Court's continuing concern for and lack of sympathy with the dual prosecution doctrine, as well as the Justice Department's continuing vigilance over the

[11] As this Court stated in *Rinaldi,* the Petite policy is a long standing policy of the federal government, recognized by this Court in *Petite v. United States,* 361 U.S. 529 530-531 (1960), against multiple prosecutions for the same act, whether they be either successive state and federal prosecutions or "successive federal prosecutions arising out of the same transaction", as occurred in *Petite;* in order for a valid federal prosecution, the Attorney General must first find that the prosecution should occur because "the reasons are compelling". *Id.* 4062, n. 5. There is no evidence in this case that the prosecutor first obtained Justice Department approval for the second prosecution of the respondent in federal court. In fact, the prosecutor's candid admission the morning of trial that he had just been made aware of the earlier tribal court conviction infers that no authorization had been obtained. (A. 26)

doctrine, strongly dictates that it should not be applied to the tribal-federal setting.

3. This court has long recognized that Indian tribes are not states and are not truly sovereign.

Indian tribes neither exist in the general territorial sense like states, nor have inherent title to or dominion over their lands. Instead, Indians occupy their lands because "it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority". *United States v. Rogers,* 45 U.S. (4 How.) 567, 572 (1846), cited with approval in *United States v. Kagama,* 118 U.S. 375, 380, 381-382, (1886). As early as 1823, the Court held that Indians were considered mere occupants without title to the land they possessed. *Johnson v. McIntosh,* 21 U.S. 542, 573-574, (1823). In *Johnson,* the Court stated that through discovery, conquest, session, treaties and history the United States obtained exclusive title to its territory and with it the sole right to eliminate Indian occupancy either by purchase or by conquest. Indeed, in *Mackey v. Coxe,* 59 U.S. (18 How.) 100, 103 (1855), the Court said of the Cherokee territory, "[i]t is not a foreign, but a domestic territory,—*a territory which originated under our Constitution and laws.*" (Emphasis added.) Such title and right is not subject to judicial review. *Johnson v. McIntosh,* pp. 587-589, supra; *United States v. Kagama,* p. 381, supra; *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903).[12]

[12] Current Indian title to land flows from Congress by legislative grant, not from any claim based on inherent tribal sovereignty. Because the United States acquired title to all lands, as noted above, only when lands are returned to the tribes through treaty or statute must they be compensated for a subsequent taking. See *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279, 285-289 (1955), and *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) for an exhaustive treatment of this issue.

Although the petitioner notes that Indian tribes are treated *in pari materia* with states and foreign nations under the commerce clause of the Constitution, Article I, §8(3),[13] in 1831 this Court recognized that in fact Indian tribes are not sovereign states or nations, but wards of the federal sovereign. In *Cherokee Nation v. Georgia*, 30 U.S. 1, at 17-18 (1831), Chief Justice Marshall defined their status when he said:

> "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; . . . They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

Because of this lesser status, the Court in *Cherokee* then held that, unlike suits between sovereign states, Indian tribes could not bring suit in the courts of the United States. *Id.* 20.

It is undisputed that the plenary authority of Congress over Indian tribes has always existed and has been exercised in a pervasive and unrestricted manner. Congress at any time may either alter or completely remove such jurisdiction and even

[13] This Clause gives Congress the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian tribes".

abrogate treaties without restriction or judicial restraint. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).[14]

The Court in *Winton v. Amos*, 255 U.S. 373 at 391-392 (1921), further recognized that Indian tribes are not sovereign like states when it said that:

> "[i]t is thoroughly established that Congress had plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease."

Unlike the sovereign state and federal entities, Indian tribes do not have the inherent power to exempt themselves from suit. Tribal immunity from suit does exist, however, not because they are sovereign like states, as suggested by the petitioner at p. 20 of its brief, but simply because the Indian tribes are dependent arms

[14] In *Lone Wolf*, the Court noted that "Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interest, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians . . . Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government . . . [L]egislative power [exists to] pass laws in conflict with [and to abrogate] treaties made with the Indians." *Id.* 565-566. The Court then refused to consider the Indian claim that their land was being obtained by fraudulent misrepresentations and concealment, stating: "We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complainant has made, and that the legislative branch of the government exercised its best judgment in the premises. In an event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation . . . *relief must be sought by an appeal to that body for redress and not to the courts*". (Emphasis added.) *Id.* 568. See also *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Head Money Cases*, 112 U.S. 580, 599 (1884); *Stephens v. Cherokee Nation*, 174 U.S. 445, 483 (1899) for examples of this principle.

of the federal sovereign and Congressional policy presently wills that they be immune from suit. *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 512-513 (1940). In making this analysis the Court, citing *Cherokee Nation v. Georgia*, supra, said "[t]hese Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did". *Id.* 512.[15] Unlike tribal immunity from suit, which exists solely as a matter of political policy,[16] the sovereign immunity of states from suit is constitutionally founded in the Eleventh Amendment.[17]

4. The evolution of Congressional plenary control over Indian tribes has long been evident and manifests the political reality of national expansion and the changing moods of society towards tribal self-government.

In *United States v. Kagama, supra*, the Court traced the evolution of Congressional control over Indian tribes in sustaining the legislative withdrawal of tribal jurisdiction over major offenses pursuant to the "Seven Major Crimes Act" of 1885 (23 Stat. 385; now 18 U.S.C. 1153 and 3242). The Court

[15] The Court based this pronouncement upon the statement of Chief Justice Marshall in *Cherokee Nation*, which recognized that Indian tribes are wards of the United States and that the intercourse between the United States and the tribes is vested in the federal sovereign. *Cherokee Nation* was also cited in *United States v. Kagama*, supra, at 382, for the proposition that Indian tribes cannot sue in the Supreme Court since they are not States or nations.

[16] Tribal immunity from suit was recently applied in *Puyallup Tribe v. Washington Game Department*, ___ U.S. ___ (No. 76-423, 1977), although in his concurring opinion the "continuing vitality" of the doctrine was questioned by Mr. Justice Blackmun.

[17] The Eleventh Amendment to the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

found that the enactment of the Act was a valid exercise of Congress' political control over the internal affairs of United States territory, *not* an exercise of the commerce power.[18] The Court expressly laid to rest any claim that Indian tribes are sovereign like states or in any way sovereign in their relation to the federal government:

> "But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.* The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress . . . But this power of Congress to organize territorial government, and make laws for their inhabitants, arises . . . from the ownership of the Country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. (Citation omitted.)" (Emphasis added.) *Id.* 379-380.

In very clear language that is equally valid today, *Kagama* recognized that as a matter of law tribes are wards of the federal government subject only to the will of Congress:[19]

[18] The Court reasoned that the Seven Major Crimes Act was not based on the commerce clause, Article 1, §8(3), n. 13, supra, because the language of the Act in no way mentioned commerce. The Court also said that tribes are not sovereign states or foreign nations, but rather totally dependent wards of the United States, subject only to the political will of Congress. *Id.* 378-385. In *United States v. Antelope*, 430 U.S. at 648 (1977), discussed at pp. 33-34, infra, this Court, citing *Kagama*, said that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country".

[19] In *United States v. Antelope*, this Court recognized that tribes are still wards of the federal guardian. 430 U.S. at 647, n. 8; 648.

"These Indians *are* wards of the nation. They are communities *dependent* on the United States. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." (Emphasis in opinion.) *Id.* 383-384.

Speaking of the guardian-ward relationship[20] and of the lack of sovereign tribal power, the Court also said:

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone [the United States] can enforce its laws on all the tribes." *Id.* 384-385.

It defined this relationship as follows:

"They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; *not as States, not as nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the

[20] The Court characterized the relationship of the various Indian tribes to the people of the United States as being "an anomolous one and of a complex character". *Id.* 381.

Union or of the State within whose limits they resided." (Emphasis added.) *Id.* 381.[21]

The Court further recognized that because Indian tribes have no sovereignty and are living in "a part of the territory of the United States", they have no jurisdiction over a white man who commits a murder within their reservation. *Id.* 380. This is the present status of the law and states have jurisdiction over crimes between non-Indians that occur in the Indian Country. See *United States v. McBratney,* 104 U.S. 621 (1882); *Draper v. United States,* 164 U.S. 240 (1896) and *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946). The *McBratney* doctrine is discussed in *United States v. Antelope,* 643-644, 648, supra.

As an example of Congressional plenary power over tribes, the Court noted that in 1871 Congress had unilaterally proclaimed that it would no longer deal with the tribes by use of the treaty powers, but instead would govern them by acts of Congress. *Id.* 382.[22] Such an act clearly dispels any suggestion that dealing with tribes by treaty evidences that they are sovereign like states or foreign nations, a status originally dispelled by *Cherokee Nation v. Georgia,* supra.

Shortly after this Court's decision in *Kagama,* another striking example of Congress' plenary power over tribal existence occurred. In 1887, Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. 331-358, popularly known

[21] This theme of tribal independence over internal affairs was later reiterated when *Kagama* was cited in *Talton v. Mayes,* 163 U.S. 376 (1896), discussed, pp. 22-23, infra. The petitioner, however, incorrectly places great reliance on *Talton* and this type of language for the proposition that tribes are sovereign like states. Pet. brief, pp. 27-31.

[22] In this proclamation, Congress said "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired". 16 Stat. 566 (25 U.S.C. 71).

as the Dawes Act. This Act authorized the division of reservation land among tribal members and implemented the new policy of assimilating Indians as citizens into American society.[23]

In 1890, shortly after the enactment of the Dawes Act, the Court again firmly laid to rest the claim that an Indian tribe is inherently sovereign in the sense that the United States or a state is sovereign and, as such, is entitled to exercise the power, jurisdiction and functions of a sovereign state over the territory it occupies. *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 648 (1890). In rejecting the tribal claim that Congress had no power to take tribal land by eminent domain, the Court, citing the "wards of the nation" principle first announced by Chief Justice Marshall in *Cherokee Nation v. Georgia*, p. 16, supra, said that:

> "The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States." *Id.* 653.[24]

In 1896, the Court was again confronted by a Cherokee Indian claim in *Talton v. Mayes*, 163 U.S. 376. In *Talton*, a tribal member asked the Court for habeas corpus relief, claiming that he was denied due process of law under the Fifth and Fourteenth

[23] This policy of assimilation lasted until 1934, when it was reversed by the enactment of the Indian Reorganization Act of 1934 (Wheeler-Howard Act). 48 Stat. 987, 25 U.S.C. 476 *et seq.*, discussed in Part 5 infra.

[24] In support of this statement, the Court fully reviewed the decisions from *Cherokee Nation* to *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886), where the Court, after saying "that the United States is a sovereign nation limited only by its Constitution", said that "[Indian tribes] fall within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe". *Id.* 653-655.

Amendments because he was indicted for murder by a five man tribal grand jury, contrary to the requirements of the indictment clause of the Fifth Amendment. The Court denied that the writ should issue. In denying relief, the Court premised its opinion by reiterating that tribes exist only as wards of the federal government:

> "*By treaties and statutes of the United States* the right of the Cherokee Nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized." (Emphasis added.) *Id.* 379-380.

After finding no apparent extension of the Fifth Amendment to the tribe in the applicable treaties and statutes, the Court reasoned that the difference between tribal and federal indictment procedures did not rise to the level of a violation of due process of law under the Fifth and Fourteenth Amendments, which then applied only as a limit on the powers exercised by the federal government. *Id.* 384. Instead, the Court characterized the Indian petitioner's claim as merely an "argument of inconvenience" based upon his being a tribal member. *Id.* 384.

Although in dicta the Court suggested that the *source* of tribal self-government existed before the Constitution, it nevertheless recognized the reality of the wardship status of Indian tribes when it said that *Kagama* had "review[ed] the whole subject" and had concluded that tribes are not states or nations. The Court then said:

> "[t]rue it is that in many adjudications of this Court the fact has been fully recognized that, although possessed of these attributes of local self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.

Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, where the cases are fully reviewed." *Id.* 384[25]

United States v. Quiver, 241 U.S. 602 (1916), repeatedly cited by the petitioner in part B(1) and (2) of its brief, pp. 17-35, in support of the claim that tribes are sovereign like states, actually supports the respondent's position. In *Quiver*, the Court held that the federal court could not prosecute adultery between Indians occurring within the reservation because Congress, in the exercise of its plenary control over the Indian wards, had not expressly and clearly provided that such an offense should be prosecuted in federal court. *Id.* 605-606.[26] In reaching this conclusion, the Court inferred that the existence and operation of tribal custom and law without federal interference resulted from Congressional policy, not from any exclusive jurisdiction or inherent sovereignty of the tribes as suggested by the petitioner in part B(1) of his brief.[27]

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[25] This full review of cases in *Cherokee Nation v. Kansas Railway* is discussed in n. 24, supra. As has already been noted, Congress can unilaterally modify, reduce, or terminate the powers of Indian tribes without judicial restraint, though such may be contrary to existing treaties and laws. *Lone Wolf v. Hitchcock*, 565-566, supra. Such a reduction occurred as a result of the enactment of the Indian Civil Rights Act of 1968, (ICRA), 25 U.S.C. 1301 *et seq.*, which extended the Bill of Rights to all of the diverse Indian reservations in the United States and reduced the jurisdiction of tribal courts to petty offenses only (25 U.S.C. 1302(7)). This enactment, although intended to further tribal self-government, in reality reduced tribal reliance on their unique traditions and customs and, hence tribal "sovereignty".

[26] This general rule of statutory construction was recognized in *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174 (1973) when the Court said that "[d]oubtful expressions [in treaties] are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. (Citation omitted.)."

[27] Speaking of the plenary power of Congress over tribes, the Court stated, "[a]t an early period it became the settled policy of Congress to permit the personal and domestic relations of Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws." *United States v. Quiver*, 603-604, supra.

5. The pervasive exercise of plenary authority over Indian tribes establishes that tribes are in essence closely supervised arms of the federal sovereign.

Although various courts have discussed the exclusive jurisdiction of tribes over their internal affairs in terms of "sovereignty", they have ultimately recognized that such a notion does not reflect the true basis and reality of tribal government.[28] In *Colliflower v. Garland*, 342 F.2d 369, 376-379 (9th Cir., 1965), the Court noted that tribal courts are, in essence, arms of the federal sovereign and, under *Ex Parte Crow Dog*, 109 U.S. 556 (1883), only in the absence of federal law to the contrary do Indian tribes have residual exclusive jurisdiction over their internal affairs. In *Colliflower*, as well as in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 96 (8th Cir., 1956) and *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir., 1972), cited and relied on by the petitioner at pp. 29 and 37 of its brief it was recognized that tribal power over internal affairs—"inherent sovereignty"—included the right to establish tribal courts to define and punish criminal conduct by tribal members. Although recognizing this inherent power, *Colliflower* and *Iron Crow* concluded that such power is insignificant in view of the plenary power of Congress to expand, contract and even eliminate tribes and tribal courts, a power that Congress cannot exercise over states. *Kills Plenty* pretermitted the issue. 466 F.2d at 243.[29]

In a very thorough and lucid opinion, the Court in *Colliflower* held that:

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[28] See discussion at p. 37, infra, of *United States v. Walking Crow*, ____ F.2d ____ (No. 77-1136, 8th Cir., 1977), petition for cert. pending #77-5539, the only case to hold that tribal and federal courts are arms of separate sovereigns.

[29] In 1953, by Concurrent Resolution, 67 Stat. B 132, Congress again adopted the policy of ending the status of Indians as wards of the United States. Thereafter, many tribes were terminated by statute. See 25 U.S.C. Ch. 14, which contains termination statutes. See also *United States v. Heath*, 509 F.2d 16 (9th Cir., 1974), discussing the Klamath Termination Act.

"[i]n spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in light of their history, it is pure fiction to say that the Indian courts . . . are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains partial control over them. In *Iron Crow v. Oglala Sioux Tribe* . . . the Court held that comparable Indian courts 'have been authorized by federal legislative action' (231 F.2d at 94) and that 'federal legislative action and rules promulgated thereunder support the authority of the tribal courts'. (Id. at 96)." *Id.* 378-379.[30]

The evolution of the Major Crimes Act, 18 U.S.C. 1153 and 3242, is a classic example of the exercise of federal plenary power over Indian tribes. In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Court vacated the federal territorial court murder conviction of Crow Dog, a Sioux Indian, because neither the 1868 treaty with the Sioux (15 Stat. 615), nor the 1887 agreement with the Sioux (19 Stat. 254), had repealed the federal statute (10 Stat. 270). In the Congressional interest of securing tribal self-government this latter statute had excluded from federal court jurisdiction offenses committed by one Indian

[30] Contrary to the urging of the petitioner at pp. 28-29 of its brief, *Iron Crow* in no way recognized that tribes are sovereign like states. In fact, "Inherent sovereignty" was used in *Iron Crow* only to emphasize that there exists an inherent right in tribes to establish tribal courts to govern their internal affairs in areas not withdrawn by law. 231 F.2d at 94. Instead, after reviewing federal legislation controlling tribal courts, *Iron Crow* emphatically and realistically concluded that "[t]here can be little doubt . . . that Congress has actually authorized the establishment and operation of the Ogallala Sioux Tribal Court." *Id.* 96. In n. 8, p. 23-24 of its brief, the petitioner suggests that the distinction between Courts of Indian Offenses ("CFR courts") and Indian Tribal courts is significant. But Congress eliminated this distinction through 25 U.S.C. 1301(3) of the ICRA, which states: "(3) Indian Court means any Indian tribal court or court of Indian offense". The petitioner's characterization of the Navajo tribal court as a "true tribal court" is therefore meaningless and confusing.

against another Indian within the confines of the reservation. 109 U.S. at 568. In reaction to the apparent public indignation over the legislative withdrawal of jurisdiction which had effectively barred the territorial court from correcting what was considered to be an uncivilized and unjust tribal disposition of this serious matter, Congress passed the "Seven Major Crimes Act" in 1885. This Act, 23 Stat. 385, removed from the tribes and vested in the federal government exclusive jurisdiction over seven major crimes committed by one Indian against the person or property of another Indian or other person within the Indian Country.[31]

Since the enactment of the Seven Major Crimes Act in 1885, Congress, in the exercise of its plenary power, has expanded exclusive federal jurisdiction over major crimes to eight in 1903, ten in 1932, twelve in 1966, thirteen in 1968 and to fourteen in 1976.[32]

In further exercise of its plenary power Congress has also removed all criminal jurisdiction from specified tribal courts. In 1953, shortly after resolving to return to assimilating the Indians into American society, Congress enacted what is popularly known as Public Law 280, 67 Stat. 588, Title 18 U.S.C. 1162. This law unilaterally transferred to the courts of certain states exclusive jurisdiction over offenses by or against Indians in the

[31] The Seven Major Crimes were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. (23 Stat. 385; now 18 U.S.C. 1153 and 3242).

[32] Assault with a dangerous weapon was added in 1903, 32 Stat. 793; Incest and Robbery were added in 1932, 47 Stat. 336; Assault with Intent to Commit Rape and Carnal Knowledge were added in 1966, 80 Stat. 1100; Assault Resulting in Serious Bodily Injury was added in 1968, 82 Stat. 80; and Kidnaping was added in 1976, 90 Stat. 585. It is significant to note that should Congress enact the new and revised federal criminal code, currently S. 1437, federal jurisdiction will be further expanded to include 20 major crimes. See S. 1437, Calendar No. 555, 11/15/77, pp. 369-370, amending 25 U.S.C. §144, which carries forward 18 U.S.C. 1151, parts of 18 U.S.C. 1152, and the expanded version of 18 U.S.C. 1153.

Indian Country within those states. In addition, the Act authorized the remaining states to assume criminal jurisdiction upon compliance with certain requirements. Not until the enactment of the Indian Civil Rights Act in 1968, 82 Stat. 77, 25 U.S.C. 1301, *et seq.*, did Congress again reverse the policy the assimilation by amending Public Law 280 to first require the consent of Indian tribes before states could assume jurisdiction over criminal *and* civil matters of the tribes, 25 U.S.C. 1321(a), 1322(a), and 1323(b).

Another clear example of the pervasive nature of federal control over Indian tribes is the plethora of federal law enacted to control all areas of Indian affairs. This body of law, contained in Title 25 U.S.C., is so broad that it occupies an entire volume of the United States Code. In addition, 25 C.F.R. contains a massive volume of federal regulations concerning all aspects of tribal life, including Law and Order, Social Welfare, Tribal Government, Economic Enterprises, etc. These laws and regulations are bold testimony to the enormous and pervasive federal role in tribal activities—a role which did not exist when *Talton v. Mayes*, supra, was decided.

Pursuant to 25 U.S.C. 2, under the direction of the Secretary of the Interior the Commissioner of Indian Affairs is charged with the "management of all Indian affairs", including the Indian Reorganization Act of 1934, popularly known as the Wheeler-Howard Act.[33] Under the Act, Congress authorized the Indian tribes, subject to approval by the Secretary of the Interior, to organize as chartered federal corporations and to adopt constitutions and by-laws to implement this policy. 25 U.S.C.

[33] 48 Stat. 987, 25 U.S.C. 461, *et seq.*, discussed in n. 23, supra.

§§476 and 477.[34] Under 25 U.S.C. 13, the Secretary of the Interior is authorized to expend moneys "for the benefit, care, and assistance of Indians throughout the United States", including employment of Indian police and judges. Finally, pursuant to 25 U.S.C. §200, Indian tribes are required to "immediately" report to the Superintendent of the reservation whenever an Indian is incarcerated by the Tribe.[35]

One of the more recent examples of the pervasive nature of Congressional plenary power over tribal justice systems was the enactment of the Indian Civil Rights Act of 1968, (ICRA), Public Law 90-284, Title 25 U.S.C. §1301-1341. In addition to modifying Public Law 280, as discussed above, the Act unilaterally imposed upon the tribal justice system certain Constitutional rights that were previously unavailable to Indians in tribal courts.[36] As a result, by requiring all tribal governments to act with uniformity regarding fundamental rights, the Act further curtailed tribal self-government, culture and individuality.

[34] The adoption of the Navajo Tribal Constitution was authorized by 25 U.S.C. §636, subject to approval by the Secretary of the Interior. The Navajo Tribal Code under which respondent Wheeler was prosecuted for disorderly conduct and disturbing the peace was also adopted by the Tribe after approval by the Secretary of the Interior, pursuant to 25 CFR §11.1(e). See *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir., 1962), which traces the federal origin of the Navajo Tribal Code and recognizes the paramount authority of the federal government over Indian tribes.

[35] Federal Regulations on all aspects of Law and Order on Indian reservations are contained in 25 C.F.R. 11.1-11.306. The presence of a BIA officer at the scene of the respondent's arrest, October 16, 1974, typifys the pervasive federal control over tribal courts and law enforcement.

[36] The Constitutional rights applied to Indian reservations include the right to habeas corpus review in the federal court of detention under the authority of an Indian tribe, the right to counsel at the defendant's expense, the right to a jury trial, the guarantee of due process of law and the imposition of limits to the range of punishment that can be handed out by tribal courts to $500 or six months. This latter provision effectively reduced tribal courts to courts of petty offense jurisdiction only. 25 U.S.C. 1302.

6. Recent decisions involving disputes with Indian tribes have recognized that Indian tribes are not inherently sovereign like states.

Since World War II, this Court has been confronted with numerous disputes between states and Indian tribes where the claim has consistently been made that tribes are inherently sovereign. The Court, recognizing that this notion is confusing and that tribes are not sovereign like states, has refused to rely on such a contention. In *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), and the companion case of *Mescalaro Apache Tribe v. Jones,* 411 U.S. 145 (1973), the Court was urged to resolve tax disputes between the States of Arizona and New Mexico and the Navajo and Apache Tribes within these states respectively. The argument urged was that tribes are inherently sovereign and, therefore, free from any state taxation of tribal matters either on or off the reservation. The Court refused to rely on this theory.[37] In *McClanahan,* after observing that the inherent sovereignty doctrine first advanced in *Worcester v. Georgia,* 31 U.S. at 557 , supra, had been used by the Court only as a means of preventing the various states from extending their criminal and civil jurisdiction to Indian reservations, the Court recognized the established principle that Indian tribes owe their existence and vitality solely to the political department of the federal government. *Id.* 169.[38] After noting

[37] In *Mescalaro,* p. 148, supra, the Court said that "[g]eneralizations on this subject have become particularly treacherous. The conceptual clarity of . . . Marshall's view [of tribal sovereignty] in *Worcester v. Georgia* [31 U.S. (6 Pet.)] 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government".

[38] Quoting from *The Kansas Indians,* 5 Wall. 737 at 755 (1867), the Court said: " 'If the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, *then* they are 'a people distinct from others' . . . [They are] governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority' ". (Emphasis added) *Id.* 169. This review was reiterated in *United States v. Antelope,* pp. 646-647, n. 7, supra.

that the tribal sovereignty doctrine has undergone considerable evolution, it rejected any further reliance on the doctrine stating, "[t]he modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power". *Id.* 172. The Court also noted that "[t]he extent of federal pre-emption and residual Indian sovereignty in the total absence *of federal treaty obligations or legislation is therefore now something of a moot question . . . [and] . . . generally of little more than theoretical importance . . .*" (Emphasis added) *Id.* 172, n. 8.

The Court then stated:

> "The Indian sovereignty doctrine is relevant, then, *not because it provides a definitive resolution of the issues . . .,* but because it provides a backdrop against which the applicable treaties and federal statutes must be read." (Emphasis added) *Id.* 172.

The Court then implicitly recognized that the Ninth Circuit correctly relied on *Kagama* when it said:

> "It must always be remembered that the various Indian tribes were *once* independent and sovereign nations and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that '[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomolous one and of a complex character . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; *not as States, not as nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *United States v. Kagama,* 118 U.S., at 381-382." (Emphasis added) *Id.* 172-173.

The Court, after analyzing the applicable treaties, statutes and enabling acts recognized that the Navajo Tribe exists and functions, not because it is a sovereign state, but only because it was created by the United States as an instrument of Congressional policy. It therefore said that the 1868 Treaty between the Navajos and the federal government "is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions". *Id.* 174. That tribes are not sovereign like states was further recognized when the Court quoted from the Arizona Enabling Act of 1912, 36 Stat. 569, which recognizes that the tribe and its lands will forever "be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States". *Id.* 175.

During 1973, the Court was also confronted with the claim of an Indian defendant that he was denied equal protection of the laws because during his Major Crimes Act trial he was denied a lesser included offense instruction though such was merited by the evidence. *Keeble v. United States,* 412 U.S. 205 (1973). Similar to its position in this case, in *Keeble* the petitioner argued that under the dicta of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Ex Parte Crow Dog,* 109 U.S. 556 (1883); and *Talton v. Mayes,* 163 U.S. 376 (1896), such a lesser included instruction should not be given because Indian tribes possess inherent exclusive jurisdiction over tribal criminal violations. Therefore, "the interests of an individual Indian defendant in obtaining a jury instruction on a lesser offense [not contained in the United States Code] must fall before the congressionally sanctioned interests of the tribe in preserving its inherent jurisdiction". *Id.* 209.

The Court implicitly rejected this claim, as it had expressly done in *McClanahan.* Instead of agreeing that the notion of tribal sovereignty should take precedence over the individual rights of tribal members, the Court looked to the language, purpose and legislative history of the Major Crimes Act, and

Rule 31(c) of the Federal Rules of Criminal Procedure. It then held that an Indian, like any other criminal defendant in federal court, is entitled to a lesser included offense instruction though such an offense might not be found in the United States Code. *Id.* 210-214. Striking a theme similar to that of *McClanahan,* the Court noted that when the Major Crimes Act was enacted in 1885, Congress implicitly rejected the notion of inherent tribal jurisdiction over criminal matters as being "either non-existent or incompatible with principles that Congress thought should be controlling". *Id.* 210. Under the circumstances, *Keeble* supports the respondent's claim that Indian tribes are not sovereign like states.

United States v. Mazurie, 419 U.S. 544 (1975), contrary to the urging of the petitioner at pp. 8, 18 and 20 of its brief, clearly indicates that the Court does not consider Indian tribes to be sovereign like states. In *Mazurie,* the Court first examined the commerce clause, Art. I §8(3), and the definition of Indian country in 18 U.S.C. 1154. It then held that Congress, *not* the Indian tribes, has the inherent and complete power to exercise or delegate to the tribes the regulation of the sale of alcoholic beverages within the Indian country. *Id.* 555-556. The Court reasoned that tribes exist as self-governing entities not because of any notion of inherent tribal sovereignty, but only because they have been delegated authority by Congress to control their internal affairs. *Id.* 553-557. Although it had already laid the platonic notion to rest in *Mescalero* and *McClanahan,* the Court nevertheless stated that tribes have "attributes of sovereignty" and "possess a certain degree of independent authority over matters that effect the internal social relations of tribal life". *Id.* 557. But the Court refrained, as it had done in *Keeble, Mescalero* and *McClanahan,* from relying on any broad concept of inherent tribal jurisdiction over its internal affairs when it said, "[w]e need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance Number 26", which

required a state and tribal license to sell liquor within the Indian country. *Id.* 557.[39]

In *United States v. Antelope*, 430 U.S. 641 (1977), this Court again clearly rejected the notion that Indian tribes are sovereign like states. In *Antelope*, Indian defendants convicted of murder under the Major Crimes Act claimed that they were denied equal protection because the state murder statute, unlike the Major Crimes Act, did not contain a felony-murder provision. Therefore, they claimed that they were being subjected to racial discrimination because the trial of a non-Indian in state court for the same on reservation incident would require the prosecution to carry a greater burden of proof in order to convict.[40] In unanimously rejecting the claim of racial discrimination the Court said, "[f]ederal regulation of Indian tribes, therefore, is goverance of *once*-sovereign, political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians' . . ." (Emphasis added) *Id.* 646. The Court cited *United States v. Heath*, 509 F.2d 16, 19 (9th Cir., 1974), and explained that the Indian defendants were recognized and prosecuted as Indians not

[39] Apparently inconsistent with its position in this case, in *Mazurie*, the Solicitor implicitly conceded that tribes do not have the sovereign powers of states when it urged to the Court that 18 U.S.C. 1154 was not void for vagueness and that "Congress has the constitutional authority to control the sale of alcoholic beverages by *non-Indians* on fee-patented land within the boundaries of an Indian reservation and that Congress could validly make a *delegation* of this authority to a reservation's tribal council". (Emphasis added) *Id.* 546. The source and extent of tribal authority over conduct of non-Indians within the Indian country is presently before this Court in *Oliphant v. The Suquamish Tribe*, ___ U.S. ___ (#76-5729). In its amicus brief in *Oliphant*, pp. 13-49, the petitioner relies on the notion of residual tribal autonomy (sovereignty) as the source for such jurisdiction, *not* Congressional delegation of power to tribes as it urged in *Mazurie*.

[40] The Court recognized that under the doctrine of *United States v. McBratney*, 104 U.S. 621 (1882), state courts have jurisdiction over crimes on the reservation involving only non-Indians, absent applicable federal law. *United States v. Antelope*, Id. 643 in 2; 644 in 4; 648 in 8.

because of their anthropological classification, but only because of their legal membership in tribes duly recognized by the federal government. *Id.* 646-647, n. 7. Such status and "legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution". *Id.* 647, n. 8.

The petitioner correctly notes that in *Antelope* the Court, citing *United States v. Mazurie*, supra, said that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are 'a separate people' possessing 'the power of regulating their internal and social relations' . . ." *Id.* 641. However, a fair reading of *Antelope* shows that these characterizations are used by the Court not because tribes are sovereign entities, but only because of their unique status as wards of the federal government while living within a duly recognized reservation under federal regulation. *Id.* 645-648. In addition to the Ninth Circuit analogy of Indian reservations to territories, 545 F.2d at 1257-1258 (Pet. App. A., pp. 5a-6a), this Court analogized the reservations to federal enclaves, although it noted that "they differ in certain respects". *Id.* 648, n. 9.[41]

[41] *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir., 1976) cert. granted, *sub nom.*, *Oliphant v. The Suquamish Tribe*, ___ U.S. ___ (#76-5729), as well as other cases cited at pp. 27-31 of its brief, does not support the claim that tribes are sovereign like states for double jeopardy purposes. This issue was not reached by *Oliphant*, which merely held that a tribe, absent contrary treaty and statutes, has the inherent jurisdiction to subject a non-Indian to tribal court prosecution for reservation conduct in violation of tribal law. Though *Oliphant* and the petitioner liberally use the term "inherent tribal sovereignty", such use is inaccurate and misleading. In essence, *Oliphant*, was dealing with the residual governing powers of a federally recognized tribe, not their sovereign existence as separate entities apart from prior federal recognition. In any event, the respondent urges that the dissent in *Oliphant* correctly concluded that any presumption in favor of inherent tribal sovereignty no longer exists. 544 F.2d at 1019. It stated that the concept is now used by the Courts only in "determining the extent to which States can properly exercise jurisdiction where the federal government has decreed a

(continued)

7. The fact that Indian tribes are not sovereign like states, the lack of significant "undesirable consequences" and the availability of acceptable non-judicial remedies for any lack of federal control over tribal courts requires affirmance of Wheeler.

The "undesirable consequences" and hinderance to federal law enforcement argument of the petitioner in Part B(2), pp. 35-43, of its brief is the rationale outlined in *Lanza, Abbate* and *Bartkus,* for the validity of the Double Jeopardy Clause dual sovereignty exception concerning successive state and federal prosecutions. Therefore, if Indian tribes are not sovereign like states, but are arms of the federal sovereign, this argument must fail. If tribes are arms of the federal sovereign, Congress in the exercise of its plenary powers, would be able to remedy any "undesirable consequences" and any hinderance to federal law enforcement that might result from the affirmance of *Wheeler* by this Court.

Only by assuming *arguendo* that Indian tribes are sovereign like states to the remaining hinderances to law enforcement and undesirable consequences outlined in *Lanza, Bartkus* and *Abbate* become possible realities in the tribal-federal setting. A review of the undesirable consequences predicted by the petitioner, however, shows that the petitioner maintains an incorrect view of the significance of the consequences it foresees and of the true nature of the present tribal-federal relationship.

One consequence foreseen by the petitioner is that Indian defendants will *avoid* federal prosecution by subjecting themselves to prosecution in tribal court, thereby invoking double

(footnote continued from preceding page)

measure of autonomy for the tribes. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right o[r] Congressional License?* 51 Notre Dame Law. 600, 627 (1976). The term 'sovereignty', then, is merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs. Id. at 629-631; see *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (Citations omitted)." *Id.* 1015.

jeopardy protection.[42] This avoidance argument necessarily infers that an Indian defendant will intentionally and knowingly subject himself to tribal prosecution in order to prevent the subsequent Major Crimes Act prosecution. However, in *Abbate v. United States,* pp. 202-203, n. 2, supra, Justice Black, dissenting, noted that jeopardy might not attach to such a sham prosecution and that a subsequent district court trial would be constitutional, citing *Edwards v. Commonwealth,* 233 Ky. 356, 25 S.W.2d 746, and *United States v. Mason,* 213 U.S. 115, 125.

The petitioner, citing *United States v. Walking Crow,* slip op. 6, supra, then argues that "federal authorities would be virtually powerless" due to the lack of effective federal control over the day to day operation of the tribal courts, to prevent the *Wheeler* situation from again occurring. (Pet. Brief, pp. 37-38). Therefore, Congress would react by further restricting the self-governing powers of tribes and the powers of tribal courts, contrary to the present policy of fostering tribal self-government. This illogical argument,[43] which is also the theme of the American Indian Policy Review Commission, *Final Report,* pp. 159-160, discussion regarding the impact of *Wheeler,* unfairly

[42] The petitioner argues: "[I]t seems reasonable to assume that many persons who have committed serious crimes on the reservation would seek to avoid [major crimes prosecution] by first standing trial (or pleading guilty) in tribal court", thereby invoking the *Wheeler* doctrine barring a second prosecution in District Court for the same conduct. (Emphasis added) Pet. brief, p. 37.

[43] The well known lack of effective federal control over and the independence of the territories of the United States, such as Puerto Rico, was recognized in *Examining Board v. Flores de Otero,* 596-597, supra. Nevertheless, the refusal of the Court to extend the Dual Sovereignty exception to territories despite such a lack of control, *Grafton v. United States, supra,* and *Puerto Rico v. The Shell Co., supra,* makes the petitioner's "undesirable consequences"argument irrelevant; instead, it supports the court of appeals' statement that "[t]he Court has construed its 'dual sovereignty' rationale narrowly and has never applied it outside of the federal court or state court context". 545 F.2d at 1257 (Pet. App. 4a).

magnifies the seriousness of the problem and evidences a gross misunderstanding of the reality of tribal-federal Major Crimes Act prosecutions. It also ignores the established fact that Indian policy is for Congress, not the established fact that Indian policy is for Congress, not the judiciary, to decide. *United States v. Kagama*, pp. 378-385, supra; *Winton v. Amos*, pp. 391-392, supra; *United States v. Antelope*, 645-646, supra.[44]

Walking Crow, Colliflower and *United States v. LaPlant*, 156 F. Supp. 660 (D. Mont., 1957)[45] are the only other reported cases over the last 20 years where Indians have successfully raised a double jeopardy type claim as a bar to successive tribal-federal prosecutions. Although the petitioner cites a few other cases where the double jeopardy claim has been raised in a District Court trial based upon the same conduct, in none of these did the court find the necessary identity of offenses and the claims failed.[46] On the other hand, in view of the American Indian Policy Review Commission, *Final Report*, recognition, pp. 163-164, that 70,000 cases were handled by the tribal courts in 1973, and that that number has increased each year thereafter, the problem is certainly not as serious as suggested. On the contrary, this lack of successful double jeopardy claims as a bar to successive tribal-federal prosecutions is strong indication that

[44] Reliance by the petitioner on the majority report of the American Indian Policy Review Commission is wholly misplaced. Vice-Chairman Meeds' (D-Wash.) dissent to the *Final Report*, at 567-612, not only discredits the majority's scholarship, but also ably and forcefully puts the entire notion of tribal sovereignty in proper perspective. This Court is urged to examine the Meeds dissent.

[45] In *LaPlant*, the government wisely conceded that the defendants had been placed in jeopardy by their tribal court assault convictions and moved to dismiss the information. The Court granted the motion. 156 F. Supp. 661-662.

[46] *United States v. Keeble*, 459 F.2d 757 (8th Cir.), reversed 412 U.S. 205; *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir.); *United States v. DeCoteau*, 516 F.2d 16 (8th Cir.), and *United States v. DeMarrias*, 441 F.2d 1304 (8th Cir.), cited at p. 37, n. 19 of petitioner's brief.

tribal-federal coordination of major crimes prosecutions is being properly carried out and that the problem is *de minimus*.

In Arizona, which contains the largest reservations and Indian population of any federal district, the real problem stems from what is viewed by the tribes as the failure by the United States Attorney to exercise his responsibility for prosecuting major crime cases presented to him for prosecution.[47] Thus, the cause of any hinderance to federal law enforcement on the reservation is not lack of control or tribal unwillingness to cooperate as claimed by the petitioner.[48]

[47] In an article on the front page of *The Wall Street Journal*, December 28, 1976, the federal prosecutor in Arizona was criticized by a tribal judge who said, "[w]e don't get any satisfaction from the U.S. Attorney's Office". The article noted that 80% of 480 cases presented for Major Crimes Act prosecution from the Navajo Reservation during one year were declined by the United States Attorney. For his part, the Chief of the Criminal Division of the United States Attorney's Office in Phoenix was quoted as saying, "[W]e don't have [Indian] felons going unprosecuted". He then recognized the real problem when he said that the United States Attorney considers the evidence on hand, the seriousness of the offense and the hardship that distance and language barriers would impose on the investigator and witnesses in deciding whether to prosecute in the Phoenix district court or to defer prosecutions to tribal courts.

[48] The procedure normally followed in the District of Arizona in prosecuting major crimes is described in the National American Indian Court Judges Association publication, *Justice and The American Indian*, Library of Congress, #74-76967, Vol. 5, Ch. 2. As occurred in this case, the procedure is initiated by either the tribal policeman or the B.I.A. special officer who first investigates the crime. Once an initial determination is made that a possible violation of the Major Crimes Act has occurred, the F.B.I. is usually notified and immediately brought into the investigation. Thereafter, either the B.I.A. special officer or the F.B.I. agent presents all the evidence to the United States Attorney for prosecution in the federal district court. Though tribal charges may be filed as a holding device, very seldom does a Major Crimes Act violation result in a conviction in tribal court as it did in *Wheeler*. In this case, a lack of communication between the B.I.A. investigator and the Tribal court may be inferred; however, the record does not clearly show why the respondent was not prevented from pleading guilty to what was already considered a potential Major Crimes Act rape prosecution. (A. 20).

There are also non-judicial solutions, acceptable to advocates of tribal self-government, should the affirmance of *Wheeler* in fact result in a serious hinderance to federal law enforcement in Indian country. As was suggested by the dissent in *Bartkus*, 359 U.S. at 157, supra, and *Abbate*, 359 U.S. at 202, n. 2, supra, if Congress in the exercise of its vested power "can make certain conduct a federal crime, it also has the power to protect the national interest. It can take exclusive jurisdiction over the crime or, if it wishes to allow [tribes] concurrent power, it can define the offense and set minimum penalties which would be applicable in both tribal and federal courts." *Id.* 202, n. 2. This would have the presently desirous effect of preserving the integrity and independence of tribal self-government.

Congress could also remedy the *Wheeler* problem by other types of legislation,[49] as it did when it amended the Major Crimes Act in 1966, 1968 and 1976,[50] and when, in response to cases recognizing constitutional defects in 18 U.S.C. 1153, it redefined crimes, added new crimes and provided penalties for crimes that were found to be unenforceable because of either defective or non-existent penalty provisions.[51]

[49] In its *Final Report*, the American Indian Policy Review Commission made many findings and recommendations to Congress for legislative revision of policy towards the Indian tribes, including several changes to strengthen the tribal justice systems. *Id.*, 169-168. However, after expressing concern for the federal instrumentality versus tribal sovereignty ramifications of the *Wheeler* decision, at 158-160, the Commission found and recommended "that no legislative action is necessary at this time". *Id.* 160.

[50] See discussion of amendments to 18 U.S.C. 1153, p. 27, supra.

[51] See *Acunia v. United States*, 404 F.2d 140 (9th Cir., 1968), where the defendant's incest conviction was reversed because at the time of his prosecution 18 U.S.C. 1153 did not specify a penalty for incest; and *United States v. Cleveland*, 503 F.2d 1067 (9th Cir., 1974), where the Court held that differing burdens of proof between Indian and non-Indian defendants prosecuted in federal court for assault arising from the same transaction denied the Indian defendants equal protection of the law.

Finally, affirmance of the Wheeler decision will very likely enhance the independence and "sovereignty" of tribes and tribal courts. If double jeopardy bars successive prosecutions in tribal and federal courts then the federal courts, as well as the tribal courts, would have to recognize the adjudications of each other, thereby nurturing tribal integrity and independence. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev., 387, 406 (1974).

It is highly unlikely, therefore, that the *Wheeler* problem is either as significant as the petitioner and the American Indian Policy Review Commission claim or that it will produce an imperative that Congress restructure and, in effect, reduce the authority of tribal courts. If such were to occur as a result of the affirmance of *Wheeler*, it would, as the Chairman of the American Indian Policy Review Commission recognized, *Final Report*, p. (III), be a policy matter for Congress, not the judiciary to resolve.

In conclusion, in dividing powers between the states and the United States, the Constitution assumes that there are but two entities to whom such powers may be allocated. This assumption is confirmed by the Tenth Amendment to the Constitution, p. 10, n. 4, supra, the clear language of *United States v. Lanza*, *Bartkus v. Illinois*, *Abbate v. United States*, the holdings of *Grafton v. United States*, *Waller v. Florida*, *Puerto Rico v. The Shell Co.* and by the other authorities discussed above.

It is clear from a thoughtful reading of the Constitution and authorities discussed herein, that sovereignty in these United States exist only in the United States and the states, and that Indian tribes, to the extent that they are granted governmental powers at all, exercise only powers of limited self-government under the authority of the United States. Therefore, since the Indian tribes govern themselves wholly under the authority of the United States, the dual sovereignty exception to the Double Jeopardy Clause does not apply.

B. Under the facts of this case, no other exception to the double jeopardy clause applies.

In Part C of its brief, the petitioner makes an "either-or" type argument in urging that "[t]he circumstances of this case either bring it within one of the the recognized exceptions to the rule barring successive prosecutions or warrant further recognition of a further exception". (Pet. brief, p. 46). A review of these exceptions shows that they are totally inapplicable to the facts of the respondent's case and the petitioner's argument must fail.

In *Jeffers v. United States,* ___ U.S. ___ (No. 75-1805, 6-16-77), concurring opinion, slip op. 13-15, this Court noted several exceptions to the bar against successive prosecutions. One exception, which allows a second prosecution by the same sovereign "when facts necessary to the greater [charge] were not discovered despite the exercise of due diligence before the first trial" (*Jeffers v. United States,* slip op. 15, supra; *Brown v. Ohio,* ___ U.S. ___ (75-6933, slip op. 8, n. 7), both cases relying on Mr. Justice Brennan's concurrence in *Ashe v. Swenson,* 397 U.S. 436, 453, n. 7), does not apply to this case for the following reasons: (1) There is no evidence in the record to support this claim. Contrary to the petitioner's suggestion, the evidence shows that the B.I.A. investigator (a federal agent) was already aware of the necessary facts to sustain the statutory rape prosecution on October 17, 1974, the day before the respondent was convicted by the tribal court. The record also shows that on October 16, 1974, the tribal police officer and the B.I.A. investigator arrested and interrogated the respondent at the scene of the crime. The next day the B.I.A. officer investigated the rape complaint and obtained the respondent's statement. (A. 15-24). On October 18, 1974, the respondent pleaded guilty in tribal court and was convicted and sentenced for contributing to the delinquency of a minor and disturbing the peace. (A. 7-10). This shows that all facts necessary to the prosecution of the statutory rape charge were available to the federal authorities by the

exercise of due diligence before the tribal court prosecution occurred; (2) In addition, the United States Attorney admitted a lack of due diligence when he stated the morning of trial, February 5, 1976, 16 months after the respondent's conviction, that until that day he was unaware of the lesser included offense conviction. (A. 26). Contrary to the petitioner's claim, this lack of diligence, as well as the manpower and logistics problems of Major Crimes Act prosecutions in the District of Arizona, discussed in Part 7, supra, are the real reasons for any "undesirable consequences" or hinderance to federal law enforcement that might arise as a result of a tribal court conviction barring a subsequent Major Crimes Act prosecution.

Relying on a theme of tribal independence, the petitioner next argues that this due diligence exception applies because (1) tribal courts are operating "wholly apart from federal courts" (Pet. Brief, 47); (2) the tribal court prosecutor is "in no respect" controlled by the United States Attorney (Pet. Brief, 47); and (3) because of their "sharply limited sentencing power" (Pet. Brief, 48-49),[52] tribal courts cannot adequately punish Major Crimes Act violators and thereby vindicate federal interests by matching punishment with the gravity of the offense. Assuming *arguendo* that this situation exists (although it does not), this does not show that the "facts necessary to the greater [charge] were not discovered despite the exercise of due diligence before the [respondent's] first trial", *Jeffers v. United States,* slip op. 14,

[52] On its face, the petitioner's apparent analogizing of the "sharply limited sentencing power of Indian tribal courts" (Pet. Brief, 48-49, n. 29), to summary courts-martial courts at issue in *Middendorf v. Henry,* 425 U.S. 225 (1976) (non-criminal, non-adversary and non-judicial proceedings where one officer is judge, jury, prosecutor and defense counsel) is greatly misleading and unsupported by the record. Such posturing clearly evidences the petitioner's tenuous position in urging that a variety of Double Jeopardy exceptions apply to the respondent's case.

thereby causing this exception to apply.[53] Therefore, this exception does not apply.

Relying on footnote 7 at page 453 in Mr. Justice Brennan's concurring opinion in *Ashe v. Swenson,* 397 U.S. 436, the petitioner next urges in Part C(3), pp. 49-51, of its brief that another exception to the Double Jeopardy Clause exists because "no single court had jurisdiction of all the alleged crimes", 397 U.S. at 453, n. 7. In support of this exception, the petitioner reasons that because the tribal court did not have jurisdiction over the Major Crimes Act statutory rape charge, the district court trial would be the first time that the respondent would be in jeopardy for this charge. Conversely, in federal district court, the respondent also would not be subject to the lesser included tribal offense (Contributing to the Delinquency of a Minor) because the district court has only Major Crimes Act jurisdiction over Indians and the lesser included offense is not a federal violation. This argument is incorrect and must fail.

This "separate jurisdictions" exception is not supported by any cited authority (c.f. 397 U.S. at 453, n. 7) and is contrary to the teachings of *Waller v. Florida, supra, Grafton v. United States, supra, Puerto Rico v. The Shell Co., supra,* as well as the holding of *Brown v. Ohio,* supra. In *Brown,* the Court established the general rule that "the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense". *Jeffers v. United States,* plurality opinion, slip op. 12. In addition, the application of this exception is directly contrary to Mr. Justice Brennan's concurring opinion in *Brown,* at p. ____ , that a defendant should be prosecuted "in

[53] In reality, the federal government's complete plenary control over tribes and tribal courts, fully discussed in Parts (4) and (5), supra, and as exemplified by the anatomy of a federal Major Crimes Act prosecution discussed in Part (7) supra, shows that the United States Attorney, through B.I.A. and F.B.I. agents, is in complete control of Major Crimes Act investigations and tribal court handling thereof.

one proceeding, except in extremely limited circumstances not present here, of 'all the charges against [him] that grow out of a single criminal act, occurrence, episode, or transaction'. *Ashe v. Swenson,* 397 U.S. 436, 453-454, and n. 7 (1970) (Brennan, J. concurring). See *Thompson v. Oklahoma,* ____ U.S. ____ 1977) (Brennan, J. dissenting), and cases collected therein".

Additionally, it is of no significance that the tribal court which first tried the respondent for a lesser included offense did not have jurisdiction to try the greater offense. In *Waller v. Florida, supra,* and *Grafton v. United States, supra,* the city court and military court that tried the lesser offenses did not have jurisdiction over the greater offenses thereafter tried by the state and territorial courts respectively. See *Farragut v. City of Tampa,* 22 S.2d 645 (Fla., 1945), recognizing that the municipal court, like the tribal court, has jurisdiction only over minor offenses. See also *Pettyjohn v. Evatt,* 369 F.Supp. 865 (E.D. Tenn., 1974), where, citing *Waller* and *Culbertson v. Wainwright,* 453 F.2d 1219 (5th Cir., 1972), the Court held that a municipal court conviction barred a subsequent state court prosecution even though the municipal court had no jurisdiction over state offenses. As occurred in this case, in *Pettyjohn* the Court observed that any breakdown in communication between the local and state authorities should not force a defendant to "climb a ladder of multiple criminal prosecutions from the 'least' included offense to the greatest". *Id.* 872. In addition, in *Ashe v. Swenson,* p. 446, supra, the Court said that the Double Jeopardy Clause should be primarily concerned with protecting the accused from having to " 'run the gantlet' a second time. *Green v. United States,* 355 U.S. 184, 190."[54]

[54] Contrary to the suggestion of the petitioner, in *Keeble v. United States, supra,* the Court did not preclude a defendant subjected to a Major Crimes Act prosecution from pleading guilty to a lesser included offense although such an offense might not be a violation of the United States Code. In fact, one experienced commentator suggests that such a procedure is available. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict,* 22 Univ. of Kansas, L. Rev., p. 387, 403 (1974).

The petitioner continues the exceptions argument by next suggesting at p. 50, n. 32, of its brief that the waiver rule of *Jeffers v. United States,* slip op. 14, should be applied to this case. This argument must be rejected for the reason that, unlike the rule and facts of *Jeffers,* the respondent did not expressly ask for separate trials on the greater and lesser offenses, or, in connection with his opposition to trial together, fail to raise the issue that one offense might be a lesser included offense of the other, thereby waiving the right to claim protection of the Double Jeopardy Clause. *Id.* slip op. 16.

Finally, the petitioner proposes at p. 44, n. 26, of its brief that a tribal-federal dual authority exception should be created and applied to the unique relationship that exists between Indian tribes and the federal government. Similar to his argument in Part B(1) and C(2) of its brief, discussed above, the petitioner urges this exception because, although Indian tribes and the federal government are arms of the same sovereign, they have separate legislative bodies and distinct laws and interests to vindicate. This argument fails because it is simply a restatement of the petitioner's principle argument that Indian tribes are separate sovereigns for double jeopardy purposes; consequently, the dual sovereignty exception applies to allow successive tribal and federal prosecutions for the same offense. In addition, if such a rule was adopted by this Court, it would necessarily result in the overruling of *Grafton v. United States* and *Puerto Rico v. The Shell Co.* In addition, in urging the application of what it considers to be a new exception to the Double Jeopardy Clause, the petitioner ignores the recognized fact that this Court has always frowned on dual prosecutions. See *Rinaldi v. United States,* 22 Cr.L. at 4063, supra, discussed in Part (2), above. Finally, *Brown, Waller, Puerto Rico v. The Shell Co.* and *Grafton* each refused to apply the dual sovereignty exception to governmental entities whose separate legislative bodies and interests are far more distant and different than those of the Indian tribes and the federal government.

In conclusion, although the above-discussed exceptions to the Double Jeopardy Clause may exist, by not discussing them the Ninth Circuit correctly recognized that none of these exceptions apply under the circumstances of the respondent's case.[55]

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectively submitted,

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[55] The petitioner is incorrect in stating in Part C of its brief that the Ninth Circuit decision "rests on the assumption that, unless the dual sovereignty principle applies, the Double Jeopardy Clause *inevitably* bars prosecution of a defendant who has been convicted [by the same sovereign] of a lesser included offense based on the same acts". (Emphasis added). By its silence, the Ninth Circuit recognized that no exception is applicable to the respondent's case.